BAXCO UNITED CORPORATION BHD

v.

ATLAS CORPORATION SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL MALIK ISHAK J
[ORIGINATING SUMMONS NO: S1-24-499-2002]
23 JUNE 2003

LAND LAW: *Housing developers - Sale and purchase of property - Guaranteed rental return scheme (GRRS) - Supplemental agreement between parties - Declaration for specific performance - Whether an abuse of the process of the court - Plaintiff's delay in exercising GRRS - Whether rendered null and void - Doctrines of waiver and estoppel - Whether should be invoked against defendant - Whether defendant entitled to set off service charges from payments due to plaintiff*

CONTRACT: *Sale and purchase of property - Guaranteed rental return scheme (GRRS) - Supplemental agreement between parties - Declaration for specific performance - Whether an abuse of the process of court - Plaintiff's delay in exercising GRRS - Whether rendered null and void - Doctrines of waiver and estoppel - Whether should be invoked against defendant - Whether defendant entitled to set off service charges from payments due to plaintiff*

By way of a sales and purchase agreement the plaintiff bought from the defendant developer a property in Menara Atlas, Plaza Pantai ('the property'). Upon representation and agreement between the two parties, the defendant guaranteed the plaintiff a net 10% return on rentals based on the purchase price of the property for the duration of the guaranteed rental period (a period of six years). The guaranteed rental return scheme ('GRRS') was entered into by way of a supplemental agreement. When the plaintiff did not exercise the option by 30 June 1996 for the GRRS, the defendant informed the plaintiff by way of letter dated 18 February 1998 that it was still agreeable to grant the plaintiff the GRRS upon the same terms and conditions as stipulated. The plaintiff duly executed the power of attorney dated 14 December 1998 giving authority to the defendant to rent out the said property. Subsequently, the defendant refused to pay the sum of RM4,166.67 which was the monthly payment due to the plaintiff

under the GRRS for the months of May, June and July 2000. The defendant took it unto itself to set off those months for the monthly service charges and interest charges on service charges of the said property.

By encl. (1), the plaintiff sought for the declaration that all the service charges and the sinking fund pertaining to the property during the guaranteed rental period be borne by the defendant, that the defendant had no right to set off the service charges and the sinking fund from the rentals of the said property and that the defendant be held liable to pay the plaintiff the sum of RM4,166.67 per month for the duration of the tenure of the guaranteed rental period and other relief and orders deemed fit. The defendant objected, raising the issues: (1) that the prayer in encl. (1) should be struck out on the ground that it was an abuse of the process of the court to seek for specific performance by way of a declaration; (2) that the plaintiff had failed to exercise the option for the GRRS before 30 June 1996, therefore the GRRS had lapsed and was therefore null and void; (3) that the defendant was under a mistake of fact and a mistake of law when the defendant issued letters allowing the plaintiff to exercise the GRRS option; (4) that the defendant was entitled to set off the service charges and the sinking fund from the GRRS payments; and (5) that the plaintiff had no *locus standi* to commence the present action bearing in mind that it had entered into a facilities agreement with Arab-Malaysian Bank Berhad.

Held:

[1] The supplemental agreement was not an agreement related to a sale, purchase or exchange of any property. Rather it provided for the contractual liability of the defendant under the GRRS. The plaintiff was compelled to seek declarations for its rights under the supplemental agreement bearing in mind that the defendant had been very aggressive in asserting its rights to deduct the service charges and the sinking fund of the property in clear and obvious violation of the supplemental agreement. The defendant was not entitled to set-off the service charges and the court made the declarations that were sought by the plaintiff. It was not an abuse of the process of the court for the plaintiff to seek specific performance by way of a declaration. Furthermore, the procedure adopted by the plaintiff was also beyond reproach since applications for declarations are filed and instituted in the High Courts by way of originating summonses. (pp 169 d-f, 170 e-f & 171 a)

[2] The plaintiff had executed the requisite power of attorney on 14 December 1998 and the defendant had unequivocally accepted that to be the case. The deadline of 30 June 1996 for the plaintiff to exercise the GRRS option had been waived by the defendant. With that, the defendant had made some payments under the GRRS to the plaintiff, and had rented out the property to Bank Bumiputra Commerce Bank Berhad. These factors demolished the defendant's arguments that the GRRS was completely null and void. Furthermore, the doctrines of waiver and estoppel must be vigorously applied in favour of the plaintiff, who was entitled to employ and apply the doctrine of estoppel by representation to its advantage by relying on the defendant's letter of 18 February 1998. These doctrines must be invoked against the defendant in order to estop the defendant from denying the validity of the GRRS. (pp 173 e, g-i & 174 a)

[3] The defendant knew about the full impact and rigours of the supplemental agreement and was willing to allow the plaintiff to subscribe to the GRRS notwithstanding the fact that the plaintiff had not exercised the option on the due date. The magnanimous gesture of the defendant as reflected in the letter of 18 February 1998 could never be construed as a mistake, bearing in mind that the defendant had collected the rentals of the property from Bank Bumiputra Commerce Bank Berhad. This was a case where the parties had entered into a legally enforceable agreement giving rise to obligations for the parties. (p 176 d-f)

[4] The defendant's contention that it was entitled to set off the service charges and the sinking fund from the GRRS payments was frivolous. Both parties were bound by the terms of the supplemental agreement and the defendant could not unilaterally act outside the purview of it. (p 176 h)

[5] The plaintiff had merely assigned the property and all the plaintiff's title, rights and interests in the sale and purchase agreement to Arab-Malaysian Bank Berhad but not its rights under the supplemental agreement. There was no necessity for Arab-Malaysian to be made a party because it had no interests whatsoever in the GRRS and the orders sought in encl. (1) would not affect its interests. The defendant's objection in regard to the issue of plaintiff's *locus standi* was accordingly dismissed. (pp 177 g-h & 179 f-g)

[Ordered accordingly in terms of encl. (1).]

Case(s) referred to:

Ajayi v. RT Briscoe (Nigeria) Ltd [1964] 1 WLR 1326 ***(refd)***

Amalgamated Investment and Property Co (in liquidation) v. Texas Commerce International Bank Ltd [1982] QB 84 ***(refd)***

Auckland Harbour Board v. Kaihe [1962] NZLR 68 ***(refd)***

Banning v. Wright (Inspector of Taxes) [1972] 2 All ER 987 ***(refd)***

Bowles v. Bank of England [1913] 1 Ch 57 ***(refd)***

BSN Commercial Bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing [1997] 3 CLJ Supp 1 HC ***(refd)***

Central London Property Trust Ltd v. High Trees House Ltd [1947] KB 130 ***(refd)***

Chan Min Swee v. Melawangi Sdn Bhd [2000] 7 CLJ 1 HC ***(dist)***

Clarion Ltd & Ors v. National Provident Institution [2000] 2 All ER 265 ***(refd)***

Combe v. Combe [1951] 2 KB 215 ***(refd)***

Charles Rickards Ltd v. Oppenheim [1950] 1 KB 616 ***(refd)***

Combe v. Combe [1951] 2 KB 215 ***(refd)***

Cooper v. Wilson [1937] 2 KB 309 ***(refd)***

Dyson v. AG [1912] 1 Ch 159 ***(refd)***

Earl of Darnley v. London, Chatham and Dover Rly Co [1867] LR 2 HL 43 ***(refd)***

Enrico Furst & Co v. WE Fischer Ltd [1960] 2 Lloyd's Rep 340 ***(refd)***

Foot Clinics (1943) Ltd v. Cooper's Gowns Ltd [1947] KB 506 ***(refd)***

Francis v. Yiewsley & West Dayton Urban District Council [1958] 1 QB 478 ***(refd)***

Fung Kai Sun v. Chan Fui Hing [1951] AC 489 ***(refd)***

Gateshead Union Guardians v. Durham CC [1918] 1 Ch 146 ***(refd)***

Gouriet v. Union of Post Office Workers [1978] AC 435 ***(refd)***

Grice v. Dudley Corporation [1958] Ch 329 ***(refd)***

Guaranty Trust Co of New York v. Hannay & Co [1915] 2 KB 536 ***(refd)***

Hunt v. Carew [1649] Nels 46 ***(refd)***

Ibeneweka v. Egbuna [1964] 1 WLR 219 ***(refd)***

Lim Cho Hock v. Speaker, Perak Legislative Assembly [1979] 2 MLJ 85 ***(refd)***

Low v. Bouverie [1891] 3 Ch 82 ***(refd)***

Max-Benefit Sdn Bhd v. Phuah Thean An & Anor [2001] 2 CLJ 70 HC ***(refd)***

Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 FC ***(dist)***

Pacol Ltd v. Trade Lines Ltd [1982] 1 Lloyd's Rep 456 ***(refd)***

Panchaud Freres SA v. Etablissements General Grain Co [1970] 1 Lloyd's Rep 53 ***(refd)***

Panoutsos v. Raymond Hadley Corporation of New York [1917] 2 KB 473 ***(refd)***

Punton v. Ministry of Pensions and National Insurance [1963] 1 WLR 186 ***(refd)***

Ridge v. Baldwin [1964] AC 40 ***(refd)***

Robertson v. Minister of Pensions [1949] 1 KB 227 ***(foll)***

Tan Sri Hj Othman Saat v. Mohamed Ismail [1982] 2 MLJ 177 FC ***(refd)***

Vine v. National Dock Labour Board [1957] AC 488 ***(refd)***

Waldron v. Sloper [1852] 1 Drew 193 ***(refd)***

Watson v. Healy Lands Ltd [1965] NZLR 511 ***(refd)***
WJ Alan & Co Ltd v. El Nasr Export and Import Co [1972] 2 QB 189 ***(refd)***
Woodhouse AC Israel Cocoa Ltd SA v. Nigerian Produce Marketing Co Ltd [1972] AC 741 ***(refd)***

Legislation referred to:
Civil Law Act 1956, s. 4(3)
Rules of the High Court 1980, O. 14, O. 15 r. 16, O. 81 r. 1(1)(a)
Specific Relief Act 1950, s. 41

Other source(s) referred to:
Malaysian High Court Practice, 1998 Desk Edition 1, pp 382, 383

For the plaintiff - Simon Hue Fook Chuan; M/s Simon Hue & Assoc
For the defendant - Ekhwan Abdul Rashid; M/s Rastam Singa & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Abdul Malik Ishak J:

Enclosure one (1)
By this enclosure, the plaintiff sought for the following prayers:

(a) a declaration that all the service charges and the sinking fund pertaining to suite A-10-8, Menara Atlas, Plaza Pantai (hereinafter referred to as the said "property") for the period commencing from 1 May 2000 till 30 April 2006 (hereinafter referred to as the "guaranteed rental period") be borne by the defendant;

(b) a declaration that the defendant has no right to set off the service charges and the sinking fund from the rentals of the said property which the defendant should pay to the plaintiff during the tenure of the guaranteed rental period;

(c) a declaration that the defendant be held liable to pay the plaintiff the sum of RM4,166.67 per month for the duration of the tenure of the guaranteed rental period;

(d) that the costs of this application be borne by the defendant and payable on the basis of solicitor client costs; and

(e) any other relief and order which this court thinks fair and suitable.

a

What Is A Declaration?

In the realm of private law, declaratory judgments play a significant role. It is a valuable remedy in order to settle disputes before those disputes reach the point where the right of one party is infringed. A good write-up on declaratory reliefs can be seen in Woolf and Zamir, The Declaratory
b Judgment, second edition. It is, however, appropriate to mention that the essence of a declaratory judgment is to state the rights or the legal position of the parties as they stand. A declaration is a discretionary remedy. It is available to anyone and against everyone. It is freely available. Thus, like the case of *Gateshead Union Guardians v. Durham CC* [1918] 1 Ch. 146,
c a child's guardian may even obtain a declaration that a county council was wrong in refusing to accept children in its schools. Even a police officer may obtain a declaration that he has not been validly dismissed (*Cooper v. Wilson* [1937] 2 KB 309; and *Ridge v. Baldwin* [1964] AC 40). A dock worker too may go to court and may obtain a declaration that he has been
d wrongfully removed from the register and thus preserving his right to be employed under the dock labour scheme (*Vine v. National Dock Labour Board* [1957] AC 488). I say that declarations are given in varying fact situations. The courts are always magnanimous and would grant declarations to a variety of applicants. In the past, declarations have been granted against unlawful tax demands (*Bowles v. Bank of England* [1913] 1 Ch. 57; and
e *Dyson v. A.G.* [1912] 1 Ch. 159), against enforcement notices (*Francis v. Yiewsley & West Dayton Urban District Council* [1958] 1 QB 478), and even against compulsory purchase orders as envisaged in *Grice v. Dudley Corporation* [1958] Ch. 329. The plaintiff must certainly have the necessary standing to sue. As Lord Diplock said in *Gouriet v. Union of Post Office*
f *Workers* [1978] AC 435 at 501:

> But the jurisdiction of the court is not to declare the law generally or to give advisory opinions; it is confined to declaring contested legal rights, subsisting or future, of the parties represented in the litigation before it and not those of any one else.

g

Standing to sue is certainly an important consideration. So long as the declarations sought are not barred by statute, the courts would be amenable to grant it. In the words of Bankes LJ in the case of *Guaranty Trust Co. of New York v. Hannay & Co.* [1915] 2 KB 536 at 572, that the jurisdiction
h to grant a declaration "should receive as liberal a construction as possible". Statutory wise, in Malaysia, O. 15 r. 16 of the Rules of the High Court 1980 ("RHC") allows the court to issue declarations and that Order is worded as follows:

i

> No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the court may make binding declarations of right whether or not consequential relief is or could be claimed.

Under this Order, the plaintiff needs only to establish that his legal interests are peculiarly affected (*Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177; and *Lim Cho Hock v. Speaker, Perak Legislative Assembly* [1979] 2 MLJ 85, 87). This would be followed by s. 41 of the Specific Relief Act 1950 (Act 137) where the plaintiff can seek a declaration as to his entitlement to a legal character, or status or right to property. The plaintiff here is not an exception. It seeks declaratory reliefs as alluded to in encl. one (1).

Facts Of The Case

The facts of a given case are very important because it would determine the prayers that the court would grant. Here, the facts may be stated in this way.

By way of a sale and purchase agreement ("S & P agreement") dated 9 February 1996 (see exh. "A1" of encl. 21), the plaintiff purchased from the defendant developer the property in question at the price of RM500,000. The plaintiff was motivated to purchase the said property by and upon the representation and agreement by the defendant developer that the latter would guarantee the plaintiff a net 10% return on rentals based on the purchase price of the said property for the duration of the guaranteed rental period – and that would be for a period of six (6) years. The guaranteed rental return scheme agreement (hereinafter referred to as the "GRRS") was entered into between the parties by way of a supplemental agreement on 9 February 1996 as seen in exh. "A2" of encl. 2. The salient terms of the GRRS were found in the supplemental agreement and captioned as the Guaranteed Rental Return and they may be stated as follows:

(1) By way of Recital "C" of the supplemental agreement, it was stipulated that, "The vendor has represented to the purchaser that the vendor shall guarantee a net 10% return on rentals based on the purchase price of the suite for six (6) years in respect of the suite ('Rental Scheme') subject to the purchaser having exercised his option by 30 June 1996 ('the said date') for the Rental Scheme."

(2) Clause 2 of the supplemental agreement stipulated that (the relevant parts only):

2. RENTAL SCHEME

2.1 The Vendor hereby offers to the Purchaser the Rental Scheme to the Purchaser subject to:

(a) the ten percent (10%) rental returns to be net based on the purchase price of the Suite as stated in the SPA after the deduction of any management cost but provided it shall be the liability of the Vendor to absorb the cost(s) of service charge and sinking fund contribution at the rates of Forty Five Sen (45 Sen) and Ten Sen (10 Sen) per square foot respectively. However, the Purchaser shall still be liable to bear the costs of:

(aa) insurance) all of which shall be confirmed
(bb) quit rent) by the Vendor only after
(cc) assessment) completion of construction of the Suite
(dd) refurbishment and interior decoration of the Suite; and
(ee) any other incidentals

(b) a guarantee period of six (6) years ('Guaranteed Period') commencing three (3) calendar months on the 1st day of the following month after the date the (Temporary) Certificate of Fitness for Occupation ('CFO') is issued by the local authority to the Suite, for example if CFO is issued on the 18th March 1998 then the guarantee period commences from the 1st July 1998.

(3) While cl. 3 of the supplemental agreement carried the following terms (the relevant parts only):

3. EXERCISE OF RENTAL SCHEME

3.1 The Purchaser shall have to exercise the option for the Rental Scheme by the said Date, failing which the Vendor's offer of the Rental Scheme to the Purchaser shall lapse and be rendered null and void and shall have no legal effect and in such an event the parties hereto shall have no further claim against each other.

3.3 The Purchaser hereby agrees with the Vendor that upon the Purchaser exercising the option for the Rental Scheme, the Purchaser shall have deemed to have irrevocably appointed the Vendor as the manager of the Purchaser to have exclusive conduct and management over the Suite including but not limited to the right to secure, arrange and procure a tenant or tenants for the Suite, negotiate and settle terms of the tenancy/tenancies, execute the tenancy agreement(s), collect and

receive the rental, demand or sue for arrears of rental, commence and conduct all lawful proceedings and means by distress or action or otherwise to recover and receive the said rental and to enforce the performance by the tenant or tenants of any covenant therein the tenancy agreement(s) and to evict the tenant or tenants to recover possession of the Suite and generally to do all things which the Purchaser would be entitled to do as landlord and the Purchaser hereby agrees to ratify and confirm whatsoever the Vendor shall lawfully do or cause to be done as manager of the Suite AND PROVIDED FURTHER that the Purchaser shall indemnify and keep the Vendor indemnified against all costs and losses which the Vendor may incur sustain or suffer by reason of the Vendor acting as manager for the Purchaser in respect of the Suite. The parties hereby agree that the option for the Rental Scheme granted by the Vendor is contingent not only on the appointment of the Vendor as manager of the Suite but also contingent on the Purchaser executing at the Vendor's cost and expense a power of attorney to appoint the Vendor or their substitute or substitutes as its attorney to manage the Suite concurrently with the exercise of the option by the Purchaser and in the event the power of attorney is not executed concurrently the option shall be deemed to have lapsed notwithstanding that the Purchaser shall have attempted to exercise the option by the said Date.

The plaintiff did not exercise the option by 30 June 1996 for the GRRS. But the defendant was rather magnanimous and allowed the plaintiff to exercise the option for the GRRS. By letter dated 18 February 1998, the defendant informed the plaintiff that the defendant was still agreeable to grant the plaintiff the GRRS upon the same terms and conditions as stipulated in the supplemental agreement. That letter of 18 February 1998 can be seen in exh. "A3" of encl. 2 and it was worded in this way:

RE: PROPERTY: SUITE NO. 1001, TOWER A, PLAZA PANTAI PURCHASER: BAXCO UNITED CORPORATION SDN BHD

We refer to the above.

We have been informed that you are still interested in our Guarantee Rental Return scheme for the 6 years which we initially offered to you upon your booking of the abovementioned Office Suite.

As a gesture of goodwill, we wish to inform you that the Management is agreeable to grant you the said Scheme despite (the fact) that you have not exercise(d) the option on the due date.

The terms and condition(s) for the Guarantee Rental Return (6 years) are (to) remain the same as per the Supplemental Agreement dated 9th February, 1996 executed between us.

Please confirm acceptance by signing and returning the duplicate of this letter to us within 7 days from the date hereof.

Thank you.

By another letter dated 16 November 1998, the defendant required the plaintiff to execute the necessary Power of Attorney in order to appoint the defendant to manage the property by way of a lease. That letter can be seen in exh. "A4" of encl. 2 and it was drafted in this manner:

RE: POWER OF ATTORNEY SUITE NO. A-1001, TOWER A, PLAZA PANTAI

We refer to the above.

Please be informed that pursuant to the Clause 3.3 of the Supplemental Agreement, you are to execute the document, 'Power of Attorney' to appoint us as your attorney to manage the abovementioned Office Suite in respect of the leasing of the Office Suite.

We are pleased to inform you that the Power of Attorney is now ready for your execution. Please contact the following solicitor at tel: 03-2610377 (Mr. Teoh) for appointment to execute the said document by 30th November 1998:

Messrs Prasad Abraham & Associates
Advocates & Solicitors
C-3-6, Megan Phileo Promenade
189 Jalan Tun Razak
50400 Kuala Lumpur

Please be informed that in the event that the PA is not executed, the GRR option shall be deemed to have lapsed notwithstanding that you have attempted to exercise the option in the earlier occasion.

Please call us should you have any queries.

And acting expeditiously, the plaintiff duly executed the Power of Attorney dated 14 December 1998 giving authority to the defendant to rent out the said property. That Power of Attorney was also exhibited as exh. "A4" to encl. 2 and it can be seen at p. 50 to p. 57 thereof.

It must be recalled that the issuance of the temporary certificate for occupation ("TCO") was an essential element governing the GRRS under the supplemental agreement because the duration of the guaranteed rental period would only commence "three (3) calendar months on the first day

of the following month after the date the TCO is issued by the local authority." In reality, the TCO bearing no: 8019 was issued on 7 January 2000 as seen in exh. "A5" at p. 59 of encl. 2 and in accordance with the provisions of cl. 2.1(b) of the supplemental agreement, the defendant had by a letter dated 12 January 2000 admitted that the payment under the GRRS shall be paid by the defendant to the plaintiff with effect from 1 May 2000. That letter dated 12 January 2000 was exhibited as exh. "A5" and annexed to the affidavit in encl. 2 and that letter was addressed to the plaintiff from the defendant and it was worded in this way:

PROPERTY : SUITE NO.A-10-8, MENARA ATLAS, PLAZA PANTAI
PURCHASER : BAXCO UNITED CORPORATION SDN BHD
RE : TEMPORARY CERTIFICATE OF OCCUPATION

We refer to the above and are pleased to inform you that the Temporary Certificate for Occupation (TCO) has been issued by Dewan Bandaraya Kuala Lumpur (DBKL) for Menara Atlas, Plaza Pantai.

Pursuant to Clause 2.1(b) of the Supplemental Agreement, the payment of the Guaranteed Rental Returns (GRR) shall commence three (3) months from the 1st day of the following month after the TCO has been issued, which means, the GRR payment to you shall commence with effect from 1st May 2000.

We will inform you as to the mode of payment in due course. For ease of reference, we enclose herewith a copy of the TCO for your safekeeping.

Thank you.

There was hardly any dispute that the monthly payment that would be due to the plaintiff under the GRRS would be in the sum of RM4,166.67 calculated on the following basis:

10% of the purchase price of RM500,000 would give RM50,000 and when divided by 12 months, the calculation would be in this fashion:

$$\frac{\text{RM50,000}}{12} = \text{RM4,166.67}$$

The defendant was merely paying lip service and there was outright refusal on the part of the defendant to pay the plaintiff the sum of RM4,166.67 per month for the months of May, June and July 2000. The defendant took it unto itself to set-off those months for the monthly service charges and interest charges on service charges of the said property and all these can

be seen in the defendant's letters to the plaintiff dated 5 June 2000, 23 June 2000 and 9 August 2000 as seen at p. 60 to p. 62 of exh. "A6" of encl. 2.

It was also not disputed and admitted by the defendant that:

(a) at all material times, the said property had been managed and rented out by the defendant to Bumiputra-Commerce Bank Berhad pursuant to the Power of Attorney granted by the plaintiff to the defendant and the rentals were collected and pocketed by the defendant (see the averments at para. 15 of encl. 2 and at para. 8 of encl. 4);

(b) subsequent to those letters dated 5 June 2000, 23 June 2000 and 9 August 2000 as alluded to earlier and as reflected in exh. "A6" of encl. 2, the defendant had, as at 31 January 2002, paid a sum of RM15,444.56 to the plaintiff under the GRRS and this can be confirmed through the averments at para. 13 of encl. 2 and at para. 7.4 of encl. 3; and

(c) the defendant had also, from time to time, attempted to increase the service charges and the sinking fund of the said property from 45 sen and 10 sen respectively to RM1.35 sen and 25 sen respectively as reflected in exh. "A8" of encl. 2.

To The Heart Of The Matter

I will now proceed to examine the issues that were raised by the defendant not in its chronological order.

(1)(a) that prayer (c) of the originating summons in encl. one (1) should be struck out on the ground that the said prayer constituted an application for specific performance of the supplemental agreement as alluded to at para. 4.1 (i) of encl. 3;

(1)(b) that it was an abuse of the process of the court to seek for specific performance by way of a declaration as alluded to at para. 4.1 (ii) of encl. 3; and

(1)(c) that the plaintiff had failed to file the application in encl. one (1) under O. 81 of the RHC as alluded to at para. 4.1 (iii) of encl. 3.

All these three issues (at (1)(a), (1)(b) and (1)(c) as set out above) must be resolved in favour of the plaintiff. Order 81 r. 1(1)(a) of the RHC states as follows (the relevant parts only):

1 Application by plaintiff for summary judgment (O. 81 r. 1)

(1) In any action begun by writ indorsed with a claim:

(a) for specific performance of an agreement (whether in writing or not) for the sale, purchase or exchange of any property, or for the grant or assignment of a lease of any property, with or without an alternative claim for damages;

the plaintiff may, on the ground that the defendant has no defence to the action, apply to the Court for judgment.

and it is similar to O. 14 of the RHC and it enables the plaintiff where there is no triable defence to the action, to obtain summary judgment in an action for specific performance of a contract. The defendant was certainly blowing hot and cold in issue (1) (a) because the defendant on its own accord admitted that prayer (c) of encl. one (1) sought for specific performance of the supplemental agreement. Having perused through the supplemental agreement, I must at once say that the said agreement was not an agreement that relate to the sale, purchase or exchange of any property. Rather, the supplemental agreement provided for the contractual liability of the defendant under the guaranteed rental return scheme – the GRRS. The plaintiff had no choice but was compelled to seek declarations for its rights under the supplemental agreement bearing in mind that the defendant had been very aggressive in asserting its rights to deduct the service charges and the sinking fund of the property in clear and obvious violation of cl. 2.1(a) of the supplemental agreement. What was frightening to the plaintiff was that the defendant was not asserting that it was not liable to make any payment of the monies derived from the GRRS to the plaintiff. It was the stand of the plaintiff that the declarations that were sought for in encl. one (1) should be granted because the defendant had disputed the plaintiff's rights to the GRRS payment and that the defendant had purported to set-off the service charges from the payments under the GRRS. It was submitted that it was necessary for this court to construe whether under the supplemental agreement the defendant was entitled to set-off the service charges. It was urged upon me that the answer to this question should be in the negative. There are write-ups that appear in the *Malaysian High Court Practice*, 1998 Desk Edition 1 and at p. 382 thereof the following passage appears:

> A declaration can be used to ascertain and determine the rights of parties or to determine a point of law, …

Continuing at p. 383, the following passage also appears:

> Where the court is asked to construe any written instrument, it is intended that the answer of the court should settle the litigation between the parties.

It was entirely within my domain to make the declarations that were sought by the plaintiff in encl. one (1). In *BSN Commercial Bank (M) Bhd v. Pentadbir Tanah Daerah, Mersing* [1997] 3 CLJ Supp 1, I made reference to the decision of Lord Denning MR in the case of *Punton v. Ministry of Pensions and National Insurance* [1963] 1 WLR 186 particularly to p. 192 where his Lordship aptly said (see p. 4 of the CLJ reporting for *BSN Commercial Bank (M) Bhd*'s case which reproduced in *verbatim* the speech of Lord Denning MR in *Punton*):

> Now, when the case is put that way, it seems to me to be a very proper matter for determination by originating summons for a declaration. Indeed, it is a sensible and modern way of approach. When an originating summons is framed so as to raise a distinct and important point of law, there is not the slightest ground for saying that it is frivolous and vexatious.

Just like the case of *Punton*, I too hold that "the procedure adopted by the plaintiff in seeking" those declarations were "beyond reproach". It was part and parcel of my judgment that it was not an abuse of the process of the court for the plaintiff to seek specific performance by way of a declaration. At this juncture, the sage words of Viscount Radcliffe in *Ibeneweka v. Egbuna* [1964] 1 WLR 219, PC must be put to the forefront. There his Lordship succinctly said:

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited, save only to its own discretion.

For these reasons, I must hold and it was my judgment that the three issues at (1)(a), (1)(b) and (1)(c) must be answered in this way. In regard to the issue at (1)(a), I must hold that prayer (c) of the originating summons in encl. one (1) as presently framed and phrased should remain on record. There was nothing objectionable about it. In regard to the issue at (1)(b), I have alluded to the fact that it was not objectionable nor an abuse of the process of the court to seek for specific performance by way of a declaration. Pertaining to the issue at (1)(c), I have this to say. The

procedure adopted was perfectly in order. In Malaysia, most of the applications for declarations are filed and instituted in the High Courts by way of originating summonses. Enclosure one (1) was also filed by way of an originating summons in this High Court and it was certainly beyond reproach.

(2)(a) that the plaintiff had failed to exercise the option for the GRRS on or before 30 June 1996 as provided for by Recital "C" of the supplemental agreement and the GRRS had therefore lapsed and was therefore null and void as reflected at paras. 5.1, 5.2, 5.3, 5.4, 5.5 and 5.6 of encl. 3;

(2)(b) that the plaintiff had failed to execute the Power of Attorney concurrently with the exercise of the option for the GRRS as provided for under cl. 3.3 of the supplemental agreement as reflected at paras. 6, 6.1, 6.2 and 6.3 of encl. 3; and

(2)(c) that the plaintiff had failed to execute the Power of Attorney by 30 November 1998 as stated in the defendant's letter dated 16 November 1998 as seen in exh. "A4" of encl. 2.

In regard to issue 2(a), it must be recalled that the defendant had in their letter of 18 February 1998 (that was reproduced earlier and marked as exh. "A3" of encl. 2) categorically stated at para. 3 thereto that, "As a gesture of goodwill, we wish to inform you that the management is agreeable to grant you the said Scheme despite (the fact) that you have not exercise(d) the option on the due date." So it can be surmised that the dateline of 30 June 1996 that was accorded to the plaintiff to exercise the option had been waived by the defendant. While discussing waiver in the context of a revenue statute, Lord Hailsham of St Marylebone LC aptly said in *Banning v. Wright (Inspector of Taxes)* [1972] 2 All ER 987 at 999, [1972] 1 WLR 972 at 980:

> Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach. I cannot construe 'waiver' as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches, and as regards unascertained or

future breaches. I am equally unable to regard a compromise forgiving a past default as the same thing as a consent licensing in advance conduct for which a prior licence is required by the terms of a contract.

I venture to say that the word "waiver" is most commonly used to describe the process where one party grants on a voluntary basis a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether it is before or after any breach of the term waived. It is said that a waiver may be express (*Charles Rickards Ltd v. Oppenheim* [1950] 1 KB 616, [1950] 1 All ER 420, CA) or implied from the conduct of one of the parties (*Panoutsos v. Raymond Hadley Corporation of New York* [1917] 2 KB 473, CA). Of significance would be that whether it is express or implied, it must be an unambiguous representation (*Woodhouse AC Israel Cocoa Ltd SA v. Nigerian Produce Marketing Co Ltd* [1972] AC 741, [1972] 2 All ER 271, HL), and that representation must arise as a result of a positive and intentional act of the party that grants the concession with all the material circumstances in mind (*Watson v. Healy Lands Ltd* [1965] NZLR 511 at 534, per Woodhouse J; *Earl of Darnley v. London, Chatham and Dover Rly Co.* [1867] LR 2 HL 43 at 57, per Lord Chelmsford LC; and *Auckland Harbour Board v. Kaihe* [1962] NZLR 68 at 88 (NZ CA), per Gresson P). According to Winn LJ in the case of *Panchaud Freres SA v. Etablissements General Grain Co* [1970] 1 Lloyd's Rep 53 at 60, CA there must be actual knowledge and that constructive notice would not be sufficient to establish waiver in the context of commercial law. The plaintiff here relied and acted upon the concession that was extended by the defendant by way of that letter dated 18 February 1998. And what the plaintiff did was entirely within the purview of what Lord Denning LJ said in the case of *Charles Rickards Ltd v. Oppenheim* [1950] 1 KB 616 at 623, [1950] 1 All ER 420 at 423, CA, where his Lordship said that for a waiver to operate effectively, the party to whom the concession was granted must act in total reliance of that concession. Lord Diplock J too said in the same vein in the case of *Enrico Furst & Co. v. W.E. Fischer Ltd* [1960] 2 Lloyd's Rep 340 at 350. The same stand was also adopted by Woodhouse J in the case of *Watson v. Healy Lands Ltd (supra)* at p. 514. I have no hesitation to hold that the deadline of 30 June 1996 to exercise the option had been waived by the defendant.

In regard to issue 2(b), I have this to say. The plaintiff was only informed by the defendant that the Power of Attorney which was prepared by the defendant's solicitors was only ready for execution sometime on 16 November 1998 (see the letter from the defendant to the plaintiff as seen at exh. "A4" of encl. 2 dated 16 November 1998). That very letter had been reproduced earlier and the last paragraph of that letter expressly stated in unequivocal terms the following salient words:

> Please be informed that in the event that the PA (referring to the Power of Attorney) is not executed, the GRR option shall be deemed to have lapsed notwithstanding that you have attempted to exercise the option in the earlier occasion.

which meant that the defendant's argument that the Power of Attorney must be exercised concurrently with the exercise of the option must fall to the ground like a deck of cards. This brings into the picture issue 2(c). Again this issue must be read in the context of the last paragraph of the letter dated 16 November 1998 as reproduced above which showed that the defendant had clearly admitted that the plaintiff had indeed previously exercised the option and had agreed that the plaintiff will be entitled to the GRRS so long as the plaintiff executed the Power of Attorney. Be that as it may, it must be recalled that the plaintiff did execute the requisite Power of Attorney on 14 December 1998 and that the defendant had unequivocally accepted that to be the case. So, the defendant in exercising its right under the Power of Attorney had rented out the property to Bumiputra Commerce Bank Berhad. I have enquired as to the monthly rentals that the defendant had collected from Bumiputra Commerce Bank Berhad but the learned counsel for the plaintiff was unable to enlighten me on the matter. Be that as it may, on second thoughts, it made not a whit of a difference as to the quantum of the monthly rentals because under the supplemental agreement any excess over and above the GRRS would belong to the defendant entirely as reflected in cl. 2.2 of the supplemental agreement. Likewise any shortfall between the GRRS and the actual rentals paid by Bumiputra Commerce Bank Berhad was of no concern to the plaintiff because the defendant had guaranteed the plaintiff the GRRS sum of RM4,166.67 per month for the period of six (6) years. Viewed in its correct perspective the fact that the defendant had made some payments under the GRRS to the plaintiff, and the fact that the defendant had accepted the Power of Attorney executed by the plaintiff and the fact that the defendant had rented out the property to Bumiputra Commerce Bank Berhad must surely be factors that ought to be taken into account and these factors would demolish the defendant's arguments that the GRRS was

completely null and void. In my judgment, the doctrines of waiver and estoppel must be vigorously applied in favour of the plaintiff. These doctrines must be invoked against the defendant in order to estop the defendant from denying that the GRRS was valid. In my judgment, the defendant must be held accountable to the plaintiff under the supplemental agreement and I must make a declaration that the defendant be held liable to pay the plaintiff the sum of RM4,166.67 per month for the duration of the tenure of the guaranteed rental period. In my judgment too, the declarations sought by the plaintiff in enclosure one (1) at prayers (a) and (b) should also be acceded to. It would be manifestly and grossly unjust or inequitable if the defendant was allowed to contend that it was not liable to pay the plaintiff the monies under the GRRS bearing in mind that the plaintiff had been deprived of the use of the rentals of the property while the defendant happily collected the rentals from Bumiputra Commerce Bank Berhad. Strangely enough, the defendant dare not contend that the tenancy of the property with Bumiputra Commerce Bank Berhad was also null and void because that contention would surely deprive the defendant of its right to collect the rentals from the said Bank. Now, surely the defendant cannot have the cake and eat it.

The letter of 18 February 1998 as seen at exh. "A3" of encl. 2 would give rise to an estoppel by representation. Basically, anyone who makes an unambiguous representation by words (*Low v. Bouverie* [1891] 3 Ch. 82) by words (*Hunt v. Carew* [1649] Nels. 46), or by conduct (*Waldron v. Sloper* [1852] 1 Drew. 193), or by silence (*Fung Kai Sun v. Chan Fui Hing* [1951] AC 489; and *Pacol Ltd v. Trade Lines Ltd* [1982] 1 Lloyd's Rep. 456) of an existing fact, and causes another party to act to his detriment in reliance of the representation will not be permitted subsequently to act inconsistently with that representation. The plaintiff here was entitled to employ and apply the doctrine of estoppel by representation to its advantage by relying on that letter of 18 February 1998 and the plaintiff here too can show that the defence was inconsistent with the representation of the defendant on which the plaintiff was relying upon (*Amalgamated Investment and Property Co. (in liquidation) v. Texas Commerce International Bank Ltd* [1982] QB 84; and *Pacol Ltd v. Trade Lines Ltd (supra)*). The case of *Robertson v. Minister of Pensions* [1949] 1 KB 227 should be applied vigorously in favour of the plaintiff. That was a case where an officer claimed a pension and he relied upon a statement by the war office that his disability had been accepted due to the military service and the war office forebore to obtain an independent medical opinion. The court held that the Crown through the Minister of Pensions could not resile

on the statement previously made. The court also held that since the officer was no longer in a position to supply the necessary evidence the Minister of Pensions was estopped from denying that he qualified. Likewise here, the defendant must be estopped from resiling from its letter dated 18 February 1998.

I must now proceed to the next issue.

(3) That The Defendant Was Under A Mistake Of Fact And A Mistake Of Law When The Defendant Issued Those Letters Exhibited As Exhibits "A5" And "A6" Of Enclosure 2 Wherein The Defendant Allowed The Plaintiff To Exercise The GRRS Option

Now, the letter in exh. "A5" of encl. 2 was a letter emanating from the defendant to the plaintiff dated 12 January 2000 and it was reproduced in the early part of this judgment. In brief, by that letter the defendant had admitted that the payment under the GRRS shall be paid to the plaintiff with effect from 1 May 2000. While exh. "A6" of encl. 2 were letters emanating from the defendant to the plaintiff dated 5 June 2000, 23 June 2000 and 9 August 2000 which showed beyond per adventure that the defendant had set off the rentals of the property for the monthly service charges and interest charges on service charges of the said property and these letters too were alluded to somewhere in this judgment.

I must, at once, say that the general principles of estoppel as alluded to by me earlier would surely defeat all the feeble contentions by the defendant. As I said, where by words or conduct, anyone who makes an unambiguous representation as to his future conduct intending that the representation would be relied upon and in consequence of which to affect the legal relations between the parties (*Foot Clinics (1943) Ltd v. Cooper's Gowns Ltd* [1947] KB 506), and the representee alters his position in reliance on that representation, then the representor will be unable to act inconsistently with the representation if by so doing the representee would be thereby prejudiced (*Combe v. Combe* [1951] 2 KB 215 at p. 220). Promissory estoppel is quite wide. It has been expanded in equity. It includes not only representations of fact but also representations of intention. Denning J gave prominence to the doctrine of promissory estoppel in the case of *Central London Property Trust Ltd v. High Trees House Ltd* [1947] KB 130 and it became firmly established and entrenched in later cases (*Ajayi v. R.T. Briscoe (Nigeria) Ltd* [1964] 1 WLR 1326; and *W.J. Alan & Co. Ltd. v. El Nasr Export and Import Co* [1972] 2 QB 189). Just like estoppel by representation, promissory estoppel too does not create a cause of action. It is used as a shield and not as a sword (*Combe v. Combe (supra)* at p. 224).

To say that the defendant was mistaken was to say something that was not correct. In fact, there was evidence that the defendant was not mistaken at all. The letter dated 18 February 1998 would categorically show that the defendant was not mistaken and that very letter was the damning feature of the present case against the defendant. There was, in my judgment, no mistake of fact and no mistake of law when the defendant issued those other letters to the plaintiff. The defendant had rented out the property to Bumiputra Commerce Bank Berhad and had reaped the harvest, so to speak. The supplemental agreement gave the plaintiff certain rights and privileges thereto and the plaintiff was only seeking reliefs under the said agreement and nothing else. Effect must be given to the supplemental agreement.

Under contract law, the word "mistake" has a narrower meaning. It is a correct statement of the law to say and I so say that parties will not be easily discharged from their contractual undertakings simply because they entered into the contract under some mistake or misunderstanding, or made a bad bargain (*Clarion Ltd and Others v. National Provident Institution* [2000] 2 All ER 265). The defendant here knew about the full impact and rigours of the supplemental agreement. The defendant was willing to allow the plaintiff to subscribe to the GRRS notwithstanding the fact that the plaintiff had not exercised the option on the due date. The magnanimous gesture of the defendant as reflected in the letter of 18 February 1998 can never be construed as a mistake. That was not a mistake at all bearing in mind that the defendant had collected the rentals of the property from Bumiputra Commerce Bank Berhad. This was not a case where the parties were under a common misapprehension either as to facts or as to their relative and respective rights. This was a case where the parties entered into a legally enforceable agreement giving rise to obligations for the parties thereto.

I will now allude to the fourth issue. It was worded in this way:

(4) That The Defendant Contended That It Was Entitled To Set Off The Service Charges And The Sinking Fund From The GRRS Payments

I will now summarily say that such a contention can best be described as nothing short of being frivolous. Clause 2.1(a) of the supplemental agreement as reproduced earlier categorically stipulated that "... it shall be the liability of the vendor (referring to the defendant) to absorb the cost(s) of service charge and sinking fund contribution ..." Both parties were bound by the terms of the supplemental agreement and the defendant cannot unilaterally act outside the purview of that supplemental agreement. This was my judgment and I so hold accordingly.

The next issue was on *locus standi* and it may be stated as follows:

(5) Whether The Plaintiff Had Locus Standi To Commence The Present Action Bearing In Mind That The Plaintiff Had Entered Into A 'Facilities Agreement And Assignment' Dated 25 July 1996 With Arab-Malaysian Bank Berhad?

The crucial clauses of the "Facilities Agreement And Assignment" to refer to would the ones styled as s. 9.01 and s. 9.05. I will now reproduce them in *verbatim*:

> Section 9.01 **Assignment**
>
> In consideration of the Bank agreeing to make available and or to continue to make available the Credit Facilities to the Borrower(s) and pursuant to Section 1.04(1)(i) hereof, the Borrower(s) as the only beneficial owners of the Property hereby ASSIGN into the Bank the Property and all the title, rights and interests of the Borrower(s) therein and the full and entire benefits, remedies and advantage whatsoever of the Borrower(s) under the Sale and Purchase Agreement to HOLD the same unto the Bank absolutely. Notwithstanding this Assignment or any other provisions of this Instrument the Borrower(s) shall and hereby undertake to pay all and any balance of the purchase monies or other monies payable under the provision of the Sale and Purchase Agreement and to continue to observe perform and be bound by all whatsoever conditions covenants and stipulations therein on the part of the Borrower(s) expressed and contained.
>
> Section 9.05 **Assignment To Remain in Force**
>
> The Assignment herein shall remain in force until the Said Charge referred to in Section 3.03(1) hereof is duly registered against the Property or the whole of the monies secured by the Property together with interest thereon and all the other monies payable to the Bank hereunder are paid in full whichever first happens but without prejudice to the Bank's rights and remedies against the Borrower(s) in respect of any antecedent claims or breach of covenant.

But, it must be borne in mind that under these sections of the Facilities Agreement And Assignment as seen in exh. "YBA1" of encl. 3, the plaintiff had merely assigned the property and all the plaintiff's title, rights and interests in the sale and purchase agreement to Arab-Malaysian Bank Berhad but not its rights under the supplemental agreement. It must be recalled that the plaintiff's rights under and flowing from the supplemental agreement pertained to payments under the GRRS which was a scheme purely in the nature of a contractual relationship between the plaintiff and the defendant and it has nothing to do with Arab-Malaysian Bank Berhad. It must also

be recalled that the prayers in encl. one (1) relate and revolve entirely on the supplemental agreement. So, it can be surmised that Arab-Malaysian Bank Berhad has no right to the GRRS payments in any circumstances whatsoever and that the said Bank was not obliged to perform any of the covenants or obligations of the plaintiff under the supplemental agreement. I venture to say that the Bank too – referring to the Arab-Malaysian Bank Berhad, was not obliged to perform any of the covenants or obligations of the plaintiff under the sale and purchase agreement of the said property. Rather, only the rights and not the obligations of the plaintiff in the sale and purchase agreement were assigned to Arab-Malaysian Bank Berhad. So, the crucial question to pose would be, "whether Arab-Malaysian Bank Berhad needs to be made a party to this originating summons?" I would swiftly respond and answer the question posed in the negative. There was no necessity to cite Arab-Malaysian Bank Berhad as a party because it would not serve a purpose at all. I say, with all convictions, that Arab-Malaysian Bank Berhad do not have any right to the GRRS payments under the supplemental agreement and that any orders that I will make in regard to encl. one (1) will not affect Arab-Malaysian Bank Berhad at all and these orders too will not bind the said Bank as well. It would, of course, be a completely different scenario if the plaintiff's action in this originating summons were to involve any of the rights of Arab-Malaysian Bank Berhad under the sale and purchase agreement, for examples, claim for compensation for late completion of the property, claim for defective construction, or for the rescission of the sale and purchase agreement which would seriously affect Arab-Malaysian Bank Berhad's security over the property and the said Bank's right to foreclose the property. In my considered opinion, it would be unnecessary to examine those authorities on *locus standi* beginning with *Nouvau Mont Dor (M) Sdn Bhd v. Faber Development Sdn Bhd* [1985] 1 CLJ 56; [1985] CLJ (Rep) 231 because all those authorities were in regard to the assignments of the sale and purchase agreements unlike the present case at hand where the plaintiff's cause of action was premised upon the supplemental agreement. It must be recalled that under encl. one (1), the supplemental agreement was put under the microscope and it showed the defendant's infringement of the plaintiff's rights under the supplemental agreement and not under the sale and purchase agreement.

In *Max-Benefit Sdn Bhd v. Phuah Thean An & Anor* [2001] 2 CLJ 70 and in *Sakinas Sdn Bhd v. Siew Yik Hau & Anor* [2002] 3 CLJ 275, the High Courts there held that the assignments therein to be not absolute but rather conditional or by way of a charge only. In *Chan Min Swee v. Melawangi Sdn Bhd* [2000] 7 CLJ 1, there were clauses in the assignment which were

similar to our ss. 9.01 and 9.05 of the Facilities Agreement and Assignment and there the defendant's application to strike out the plaintiff's claim therein proceeded on the argument by the defendant's counsel that it was a conditional assignment as opposed to an assignment that complied with s. 4(3) of the Civil Law Act 1956.

The assignment in the present case was conditional and they were quite similar to the assignments found in *Max-Benefit*, *Sakinas* and *Chan Min Swee.*

The High Court Judges in *Max-Benefit* and in *Sakinas* had decided that the plaintiffs in those actions had the *locus standi* to commence the actions without the need to join the assignee banks as parties to the actions. Whereas the High Court Judge in *Chan Min Swee* had decided to the contrary.

But one thing was certain. It was this. The *ratio decidendi* in those three cases – referring to *Max-Benefit, Sakinas* and *Chan Min Swee,* have no bearing to the present case at hand because the assignments in those three cases relate to the rights in the sale and purchase agreements unlike the present case at hand where the rights of the supplemental agreement were not assigned and were of no concern to Arab-Malaysian Bank Berhad.

In *Chan Min Swee* there was a need for the assignee bank to be made a party to that action because the plaintiff's case there was for rescission of the sale and purchase agreement and thus the decision of the High Court Judge would, of course, be of paramount importance to the assignee bank whose interests as a secured party of the loan would be affected. So, I can easily surmise that, in the context of the present case, there was no necessity for Arab-Malaysian Bank Berhad to be made a party because the said Bank have no interests whatsoever in the GRRS and the orders sought herein in encl. one (1) would not affect the said bank's interests and their security over the property would remain intact. Accordingly, I must dismiss the defendant's objection in regard to the issue of *locus standi.*

Conclusion

For the reasons as adumbrated above, I gave an order in terms of encl. one (1) at prayers (a), (b), (c) and (d).